STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
v	No. 300457 Kent Circuit Court
ROMALLE LEE LAIRD, Defendant-Appellant.	LC No. 10-001234-FH

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of delivery of a controlled substance within 1,000 feet of school property, MCL 333.7410(2). He was sentenced as an habitual offender, second offense, MCL 333.7413, to 4 to 60 years' imprisonment. We affirm.

While conducting surveillance in the area surrounding Catholic Central High School, an area known for drug trafficking, Grand Rapids police officers observed defendant repeatedly transfer several small white objects from his mouth to his pocket and back to his mouth again, in a manner suggesting that he was inventorying and concealing narcotics in his mouth. Officers then observed and videotaped defendant apparently selling crack cocaine to William Herth, a known crack addict. Defendant was thereafter detained, but no narcotics were found on his person. Herth was detained a short time later, highly intoxicated, with two pieces of crack cocaine on the sidewalk at his feet. He testified that defendant sold him the crack cocaine. Defendant was charged with and ultimately convicted of delivery of a controlled substance within 1,000 feet of school property.

On appeal, defendant first argues there was insufficient evidence to support his conviction. We disagree.

We review de novo a challenge to the sufficiency of the evidence, viewing the evidence most favorably to the prosecution to determine whether a rational finder of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). We resolve all evidentiary conflicts in favor of the prosecution, *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004), and "afford deference to the jury's special opportunity to weigh the evidence and assess the credibility of the witnesses," *People v Unger*, 278 Mich App 210, 228–229; 749 NW2d 272 (2008).

"Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

A conviction of delivering less than fifty grams of a controlled substance requires proof that the defendant delivered a controlled substance and that there were less than fifty grams of that controlled substance. *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001). "Delivery" means "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there was an agency relationship." *Id*. at 702, citing MCL 333.7105(1). Under MCL 333.7410(2), the delivery must take place within 1,000 feet of school property or a library. Therefore, the evidence here must show that defendant transferred less than 50 grams of a controlled substance within 1,000 feet of Catholic Central High School. Reviewing the record in a light most favorable to the prosecution, we are satisfied that the essential elements of the crime were proven beyond a reasonable doubt.

Officer Todd Butler testified that he was part of a surveillance team watching the area of God's Kitchen mission, just down the road from Catholic Central High School, when he noticed defendant pacing back and forth. He saw defendant spit objects into his hand, look at them, and place them back into his mouth several times. According to Officer Butler, in his experience as a narcotics officer, crack cocaine dealers often keep small quantities of wrapped narcotics in their mouth so that if an officer approaches they could swallow the narcotics to keep them from being detected. Officer Butler testified that he saw defendant make several contacts with Herth, whom he recognized from prior contacts and knew to be a crack cocaine addict. During one contact, Herth removed his wallet and had it open in his hand while defendant appeared to hand Herth something. Officer Amanda Linklater testified that while conducting surveillance in the same area, she observed defendant spit several small white objects into his hand. She then observed defendant and Herth engage in what she believed to be a hand-to-hand drug transaction.

Herth testified that he was in the area near Catholic High School on the date of the incident at issue. Herth testified that he was intoxicated and decided to buy some crack cocaine. According to Herth, he had about $7 and when he saw defendant, whom he had known for a year or two, he approached defendant to see if he had any crack for sale. Herth testified that he purchased two tiny pieces of crack from defendant for the $7 and had not even opened the rocks before the police approached him on the sidewalk. Herth testified that he dropped the rocks when the police approached him. The combined testimony from Herth and the officers was sufficient evidence to convict defendant. Defendant argues that no physical evidence, such as fingerprints, linked him to the crack cocaine, but physical evidence is not required. Circumstantial evidence may be sufficient to establish the elements of a crime. *Fennell*, 260 Mich App at 270.

Defendant argues that this case is a credibility contest and that Herth is not a credible witness. However, it is the province of the jury to assess the credibility of witnesses. "As the trier of fact, the jury is the final judge of credibility." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Herth was intoxicated at the time of the incident, and he was himself charged with a crime arising out of the incident and testified pursuant to a plea agreement. However, the jury was aware of those facts. The jury nevertheless convicted defendant. The jury may have deemed Herth's testimony to be nevertheless credible, or perhaps it concluded that the remaining evidence was sufficient. In any event, this Court cannot determine what testimony to believe.

The jury is solely responsible for evaluating witness credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

Defendant also contends that the video of the police department surveillance does not unequivocally support only the prosecution's theory that defendant engaged in a drug transaction with Herth. Essentially, defendant contends that his innocent version of the events transpiring on the video is just as plausible as the prosecutions' theory, so he concludes that the evidence was insufficient to convict him. However, the prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Here, it has done so. Defendant's claim of insufficiency of the evidence thus fails.

Defendant next asserts that the trial court erred in allowing 404(b) testimony in evidence. We disagree. This Court reviews evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

As our Supreme Court has explained, MRE 404(b) is a broad and nonexhaustive rule of inclusion, not a limited rule of exclusion. *People v Mardlin*, 487 Mich 609, 614-616; 790 NW2d 607 (2010). The evidence must be relevant and material, pursuant to MRE 401 and MRE 402, and it should be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, pursuant to MRE 403. *Id*. However, otherwise, evidence "is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity." *Id*. at 616 (emphasis in original). The other acts are also not required to be similar to the crime charged. *People v VanderVliet*, 444 Mich 52, 69; 508 MW2d 114 (1993).

Defendant entered a general plea of not guilty to all of the charges against him, so all of the elements of the offense—including intent—were put at issue, and the prosecutor was required to prove all of them. The proposed other acts evidence here was the result of a prior search warrant executed at defendant's girlfriend's apartment, during which defendant was arrested when a search of his pockets revealed that he had fifteen to twenty rocks of crack cocaine, most of which were individually packaged, in his possession. In the instant case, defendant did not have any drugs on his person when he was arrested, and he claims that it was therefore impossible for him to have had any intent to sell drugs. "Where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant." *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005). The trial court properly reasoned that defendant's past possession of a significant amount of cocaine with the intent to

transfer it to others was relevant to whether defendant had any intent to sell drugs to others in the instant case.

Given the allegation that defendant had already transferred the drugs in this case, coupled with his claim that he was not in any way participating in a drug transaction, his prior act is particularly relevant to his intent here, because it clearly shows that he had been in possession of narcotics with the intent of distributing them in the past. See *People v Breidenbach*, 489 Mich 1, 13 n 22; 798 NW2d 738 (2011). Significantly, this evidence showed that defendant did not merely previously possess crack cocaine, but rather that he possessed crack cocaine for the purpose of transferring it to another person in exchange for some benefit to himself. "The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently . . . and conversely, the more likely it is that the defendant's act is intentional." *McGhee*, 268 Mich App at 611.

Defendant's intent to deliver a controlled substance is relevant and a proper purpose; the evidence was not admitted to show character. See *Guerrero v Smith*, 280 Mich App 647, 653; 761 NW2d 723 (2008). The evidence was relevant because it tended to show that defendant more likely than not did have the intent to sell drugs. See *People v Waclawski*, 286 Mich App 634, 672; 780 NW2d 321 (2009). And its probative value was not substantially outweighed by any danger of unfair prejudice. *Id*. at 673. Therefore, admission of the other acts evidence under MRE 404(b) was proper.

Defendant next argues that the trial court erred in denying his motion for a mistrial. We disagree. A mistrial should only be granted if an irregularity occurs that prejudices the defendant's rights so much that it impairs his ability to receive a fair trial, and we review the trial court's decision for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). The trial court's remedy for any noncompliance with discovery is also reviewed for an abuse of discretion. MCR 6.201(J); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

Defendant moved for a mistrial on the first day of trial testimony, after the conclusion of the first witness's testimony. Prior to trial, defendant had requested a copy of the surveillance recording that had been made of the incident. Although defendant had been given a copy of that recording, it was discovered during the first witness's testimony that defendant's copy was incomplete. Defense counsel was given the opportunity to view the recording before trial continued, and promptly moved for a mistrial on the basis of a discovery violation, contending that the recording completely contradicted the defense that had been prepared. The trial court found that the failure to provide the complete recording was unintentional and due to a technical problem. The trial court also found that the police reports disclosed the officers' perceptions of what had transpired, defense counsel was present for the preliminary examination and had heard the officers' testimony then, and defendant was aware of his own actions. The trial court concluded that the complete recording should not be surprising.

Defendant argues that his defense strategy was undermined, but it appears from the record that it did not change. Specifically, defendant contends that his initial strategy was to argue that the officers' perceptions were mistaken and that the incomplete recording supported that theory. However, defendant's strategy continued to be that the officers' perceptions were

mistaken. Indeed, defense counsel used the complete recording to his advantage, pointing out the many contacts between Herth and others within the same time frame that he had contact with defendant. Moreover, defendant's claim of unfair surprise is implausible. Defendant was aware from the partial recording that his actions had been recorded, and he was presumably aware of what he actually did and the fact that the provided recording was incomplete. Under these facts, the trial court did not abuse its discretion in denying defendant's motion for a mistrial as a remedy for violating a discovery rule.[1]

Defendant next contends that the trial court erred in allowing several police officers to provide expert testimony without first ensuring the proper foundation for allowing such testimony was met. Defendant specifically takes issue with the testimony of two police officers concerning defendant's actions in putting his hand to his mouth and spitting things into his hand as being typical of one dealing narcotics. According to defendant, the trial court failed to ensure that this expert testimony was relevant and reliable as required by MRE 702 and MRE 104. We disagree.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Lukity*, 460 Mich at 488. However, defendant objected to only one of the officer's testimony on the basis of expertise. As to the testimony to which he did not object, the issue is unpreserved and we review the same for plain error. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

Expert testimony is admissible under MRE 702 if the trial court determines that specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in evidence. A witness qualified as an expert by knowledge, experience, skill or training may testify to an opinion if his testimony is based on sufficient facts, is the product of reliable principles and methods, and if the witness has applied the principles and methods reliably to the facts of the case. MRE 702. As pointed out by defendant, the obligation imposed by MRE 702 is reinforced by MRE 104(a), which provides that "[p]reliminary questions concerning the qualification of a person to be a witness . . . *shall* be determined by the court. . . ." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004). Thus, MRE 104 requires the trial court to address these preconditions before admitting expert testimony. *Id*.

We have reviewed the challenged testimony thoroughly. We agree with defendant that neither officer was qualified by the trial court as an expert, and the trial court does not appear to have engaged in any analysis under MRE 702. However, it is also manifestly obvious that the officers did not provide the type of scientific, technical, or specialized knowledge that would necessarily fall within the parameters of "expert" testimony. Rather, they described what they had observed many times before in their years of experience conducting narcotics enforcement and investigation as police officers and explained why they believed defendant's conduct was similar to patterns of drug transaction behavior they had seen many times before. Both officers'

[1] Defendant also argues that the trial court should have suppressed the recording as an alternative remedy for the discovery violation, but because he provides no supporting argument, we decline to consider this issue. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

opinions as to whether defendant's actions were consistent with drug trafficking came from their own observations and personal experiences.

Lay opinion testimony is admissible pursuant to MRE 701 if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." In *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994), a police officer testified that he observed several motor vehicles approach an apartment and the defendant then run to each vehicle as it stopped and lean inside the window for ten to fifteen seconds. The officer properly provided lay opinion testimony that the defendant was selling narcotics to the occupants of the vehicles, because the testimony was rationally based on the officer's perception and assisted the jury in determining whether the defendant was involved in narcotics trafficking. *Id*. at 57. We find the same to be true here. The challenged testimony was based upon the officers' personal observations and experiences, and served to explain to the jury why defendant's actions caught their attention and prompted their continued observation, and it assisted the jury in its ultimate determination. The testimony was properly admitted.

Defendant contends that his motion for directed verdict should have been granted "for all the reasons . . . made above." We review de novo a trial court's decision on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court views the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). A directed verdict is inappropriate if reasonable people could honestly reach different conclusions about whether the nonmoving party established the claim. *Id.* at 500. Because none of the defendant's previously discussed challenges have merit, there is no basis upon which to find any error in the trial court's denial of defendant's motion for a directed verdict.

Defendant next argues that the prosecutor engaged in misconduct that denied him a fair trial and his due process rights by bringing in irrelevant and prejudicial testimony, failing to disclose the entire plea bargain offered to Herth, and eliciting the police officers' opinion testimony about defendant's guilt. We disagree.

Generally, we review issues of prosecutorial misconduct de novo, on a case-by-case basis, to determine whether such acts denied the defendant his right to a fair and impartial trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). However, we review unpreserved claims of prosecutorial misconduct for plain error. *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007). Under this standard, reversal is warranted "only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant first argues that the prosecutor committed misconduct by eliciting allegedly irrelevant and prejudicial statements. The prosecutor introduced evidence that defendant was in an area known for drug trafficking and was engaged in "suspicious" behavior such as not being in line for food at the mission in the area. This was highly relevant to explain why the police were conducting surveillance in the area to begin with and why defendant drew their attention, so it is part of the "complete story" that the jury is entitled to hear. *People v Aldrich*, 246 Mich App 101, 115; 631 NW2d 67 (2001). Furthermore, all relevant evidence will be prejudicial in some

way to at least one party, but it is only excluded when its probative value is *substantially outweighed* by a danger of unfair prejudice. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Defendant has not demonstrated that the challenged evidence was unfairly prejudicial, let alone that its probative value was substantially outweighed by the danger of unfair prejudice.

Defendant also contends that the prosecutor engaged in misconduct by failing to reveal to the jury the exact contents of the plea deal Herth received in exchange for his testimony against defendant. We disagree. Where a witness has been granted immunity or some other leniency, it is incumbent upon the prosecutor and trial judge to disclose the fact to the jury upon request of defense counsel. *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). Here, whether the jury was provided with the minutiae of Herth's agreement is not of concern. The gravamen of the plea agreement was articulated to the jury: that Herth was charged with a serious crime as a result of his participation in the drug transaction at issue, that Herth was facing a life sentence for that offense, and that as a consequence of his testimony, he would instead serve less than eight months in jail. No additional details would change the obvious significance of the agreement to Herth's potential credibility, and so no plain error occurred because of their omission.

Defendant finally asserts that the prosecutor committed misconduct by eliciting the officers' testimony that defendant's actions were consistent with drug trafficking. Defendant argues that this was irrelevant opinion testimony. As discussed, this testimony was relevant, and it was properly admitted pursuant to MRE 701. We find no misconduct.

Finally, defendant alleges that trial counsel was ineffective. While not entirely clear, it appears that defendant's allegation of ineffectiveness stems from trial counsel's failure to object to the prosecutor's alleged acts of misconduct. However, because we find no misconduct on the part of the prosecutor, counsel is not ineffective for failing to make what would have been futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Jane E. Markey
/s/ Amy Ronayne Krause